IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 193

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

Vs.

WATERMAN STEAMSHIP CORPORATION,
Respondent.

PETITION FOR REHEARING

AND

BRIEF AND ARGUMENT OF WATERMAN STEAMSHIP CORPORATION IN SUPPORT THEREOF.

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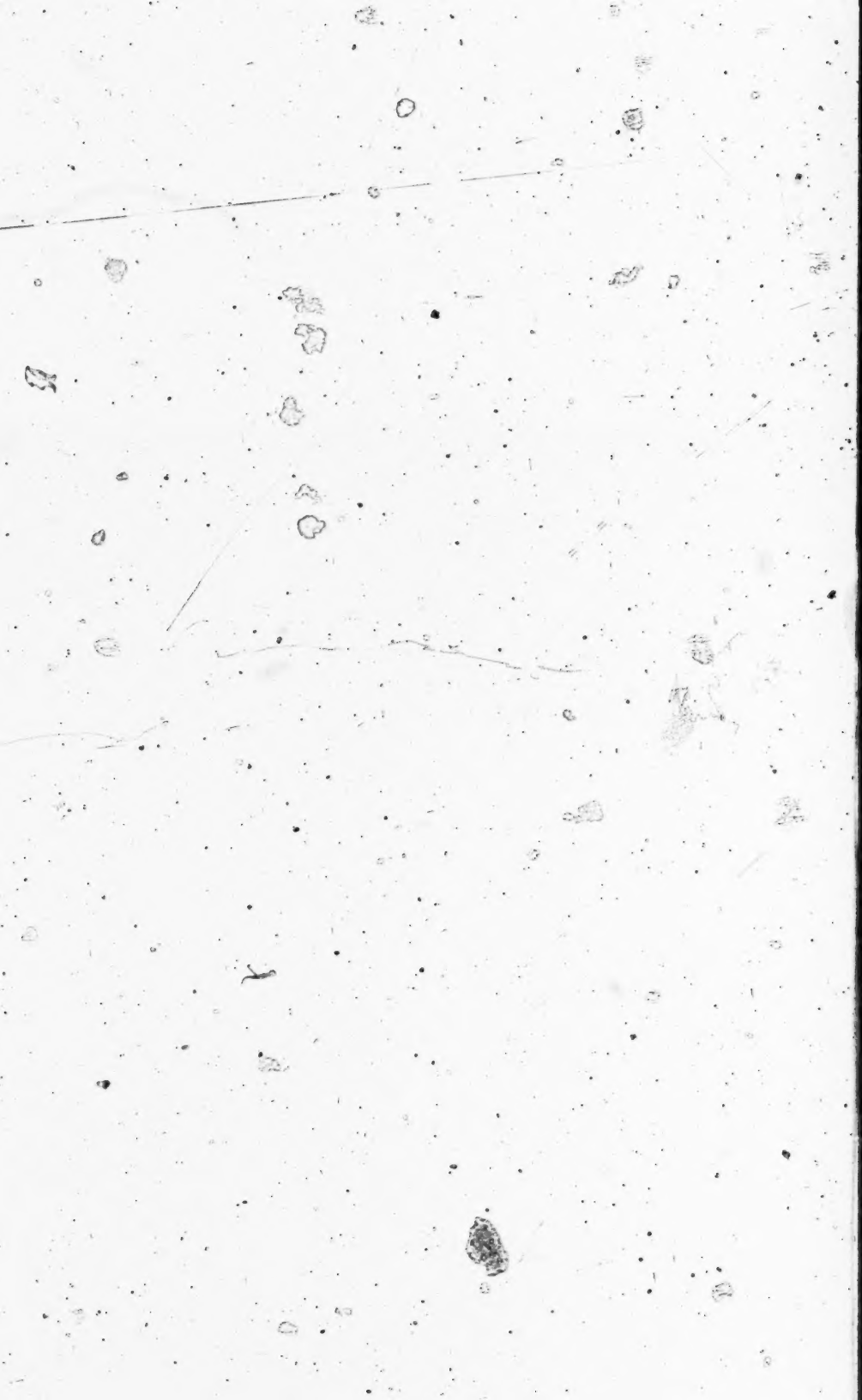

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TO THE SUPREME COURT OF THE UNITED STATES AND TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES THEREOF:

Comes now the Waterman Steamship Corporation, the respondent in the above styled cause, and presents this, its petition for a rehearing in the said cause, and in support thereof respectfully shows unto the Court as follows:

I.

The decision of the Court in said cause fails to give effect to the well established principle of law that a

written and express contract cannot be controlled or varied or contradicted by a usage or custom, and that usage or custom cannot make a contract where there is none.

II

The opinion of the Court in said cause indicates that the Court erroneously assumed that there was a finding of fact by the National Labor Relations Board which afforded a legal basis for the conclusion of the Board that there was a continuous term of employment of the seamen regardless of shipping articles, although in truth and in fact there is no such finding of fact by the Board, and the said conclusion of the Board is based solely upon the erroneous conclusion of law that a general usage or custom can vary or alter the provisions of a written contract of employment or can make a contract of employment where none otherwise existed.

III

The conclusion of the said Board that there was a continuous term of employment regardless of shipping articles, which conclusion was upheld by the decision of the Court in the said cause, is not supported by any finding of fact by the said Board that there was in fact any contract of employment in existence providing for such continuous term, but is based solely upon the erroneous conclusion of law that a general custom or usage can vary or alter the provisions of a written contract of employment or can make a contract of employment where none otherwise existed.

IV.

The opinion of the Court in said cause indicates that the Court upheld the order of the Board upon the

theory that the Court was bound by statute to give conclusive effect to the findings of fact made by the Board, but, in so holding, the Court failed to consider that the conclusion of the Board that there was a continuous term of employment of the seamen regardless of the shipping articles is not based upon a finding of fact but upon the erroneous conclusion of law that a general custom or usage can vary or alter the provisions of a written contract of employment or can make a contract of employment where none otherwise existed.

V.

The opinion of the Court indicates that if the Court had not reached the conclusion that the employment of the seamen in question was continuous, the decision of the Court as to the alleged discriminatory discharges would have been different.

WHEREFORE, upon the foregoing grounds it is respectfully prayed that this petition for a rehearing be granted, and that the opinion and judgment of this Court heretofore rendered in this cause be set aside and that an order now be entered by this Court affirming the judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Gessner T. McCorvey,
Mobile, Alabama.
Attorney for Waterman Steamship Corporation.

C. A. L. Johnstone, Jr.,
Mobile, Alabama.

McCorvey, McLeod, Turner & Rogers,
Mobile, Alabama,
Of Counsel.

I, Gessner T. McCorvey, Attorney for Waterman Steamship Corporation, do hereby certify that the foregoing petition for a rehearing, and the accompanying brief and argument in support thereof, are presented in good faith and not for delay.

Executed this 5th day of March, 1940.

(Gessner T. McCorvey).

Subscribed and sworn to before me by Gessner T. McCorvey, on this the 5th day of March, 1940.

(O. H. Swinson)

Notary Public, Mobile County, Alabama.

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BRIEF AND ARGUMENT OF WATERMAN STEAMSHIP CORPORATION IN SUPPORT OF PETITION FOR REHEARING

The decision of this Court, as set forth in the opinion of Mr. Justice Black, absolutely revolutionizes the heretofore generally accepted construction of the relationship existing between steamship companies and the seamen employed to operate their steamships. The opinion of Mr. Justice Black has placed on the shipping articles commonly in use by the American Merchant Marine a construction which we are confident no steamship company ever dreamed of as being a proper construction, and a construction which we do not think any seaman sincerely contended for.

Not only is the Waterman Steamship Corporation vitally interested in seeing a proper construction placed upon the shipping articles under which it has employed countless thousands of seamen to operate its large fleet of ships, but practically every steamship company in America is interested in the same proposition. As an illustration of the number of steamship companies which are interested in this proposition, it will only be necessary for us to point out to the Court that in Article VII, Sec. 2, of the contract entered into between the Waterman Steamship Corporation and the I. S. U. (Respondent's Exhibit No. 14) there are forty-two other steamship companies which have entered into identically the same contract, and this contract only includes the Atlantic and Gulf Districts,—there no doubt being many other steamship lines operating on the Pacific Coast which are equally interested in having a proper construction placed upon these shipping articles which are universally used by the American Merchant Marine.

All of the seamen involved in this case signed shipping articles for a definite and fixed voyage back to the port of discharge, which was Mobile, Alabama. The opinion of Mr. Justice Black holds, in effect, that when these seamen sign these shipping articles and make their voyage and return to the port of discharge,

even after "signing off" the shipping articles, and after they are formally and legally discharged, there is still some kind of continuing relationship between them and the Steamship Company which prevents the occurrence of a vacancy in the crews of these ships. This position is taken by Mr. Justice Black even though the Waterman Steamship Corporation, upon the termination of the shipping articles, has no further claim on the services of these seamen, and notwithstanding the fact that the Waterman Steamship Corporation, under our existing laws, can not even permit these seamen to work for it again until they have signed a new written contract in the shape of shipping articles.

The opinion of the Court in this case, delivered by Mr. Justice Black, shows that the Court had very carefully reviewed the evidence in this case, and reached the conclusion that this evidence is sufficient to support the findings of fact made by the National Labor Relations Board, and that, therefore, these findings of fact are conclusive under the provisions of the applicable statute. Inasmuch as the Court has carefully reviewed this evidence we will not here raise any question as to the sufficiency of the evidence to support the findings of fact made by the Board.

However, even though every finding of fact made by the Board is conclusive and binding, there yet remains one material conclusion of law made by the Board which cannot legally be reached upon the basis of any finding of fact made by the Board. In the language of the opinion of this Court in this case, "Congress has left questions of law which arise before the Board . . . ultimately to the traditional review of the judiciary." Therefore, if this conclusion of law made by the Board was erroneous, there is no statutory restriction to fetter the Court and prevent it from correcting such error.

The conclusion of law to which we refer is the conclusion that the general practice or custom as to con-

tinuity of employment, which the Board found to exist, had the effect of changing or varying the terms of the written contract of employment between the parties in this case, or had the effect of creating a contract of continuing employment. It has been repeatedly and consistently held by this Court that no written contract can be controlled or varied by usage or custom, nor can any usage or custom engraft upon a written contract terms and provisions in addition to, and inconsistent with, those expressed therein. On the contrary, it is the contract which controls the usage or custom. This proposition of law has been stated by this Court as follows:

> "An express contract of the parties is always admissible to supersede or vary or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom, for that would not only be to admit parol evidence to control, vary or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention to control, vary or contradict the most formal and deliberate written declarations of the parties . . . No usage can be incorporated into a contract which is inconsistent with the terms of the contract."
>
> Orient Mut. Ins. Co. v. Wright, 68 U. S. (1 Wall.) 456, 17 L. ed. 505, 509.
>
> "Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing.
>
> "Usage cannot make a contract where there is none, nor prevent the effect of the settled rules of law."

First National Bank v. Burkhardt, 100 U. S. (10 Otto) 686, 25 L. ed. 766.

The conclusion of the Board that there was a continuing employment relationship in this case, beyond the term specified by the written shipping articles, is not based upon any finding of fact that the parties themselves had made any contract, express or implied, for such continuing employment. However, the opinion of the Court in this case, delivered by Mr. Justice Black, indicates that the Court erroneously assumed that there was such finding of fact.

The opinion of the Court in this case further indicates that if the Court had not reached the conclusion that there was a continuing term of employment beyond that specified in the shipping articles, the decision of the Court would have been different with respect to the alleged discriminatory discharges. Under these circumstances, we believe it is in order to bring this matter to the Court's attention and to request a reconsideration of this phase of the case.

In order to demonstrate clearly the point which we are making, we will analyze as briefly as possible the relevant portions of the opinion of the Court in this case and the relevant portions of the findings of the Board, and refer briefly to the authorities of law upon which we rely.

The opinion of the Court in this case, delivered by Mr. Justice Black, made the following statement with respect to this point:

> "This statutory plan (providing for shipping articles)[1] was never intended to forbid the parties from **mutually undertaking to assure a crew** the right to continue as employees and to re-sign if it

[1] Words in parenthesis supplied by us.

> desires after signing off articles at a voyage's end . . . If, therefore, there was substantial support in the evidence for **the findings that these crews had a continuing right** to and customary tenure, term or condition of employment within the purview of the Act . . .the court below was required to enforce the Board's order."

There is necessarily an implication in this language that there was some finding of **fact** by the Board either (1) that there was a separate contract, express or implied, in addition to the shipping articles, which provided for a continuing term of employment, or (2) that there was some finding of fact which could lead to the conclusion of law that there was a continuing contractual employment relationship. Indeed, the entire opinion in this case indicates that it was assumed by the Court that there was such a finding of **fact** by the Board, and that the Court concerned itself chiefly with reviewing the evidence to determine whether or not such finding of fact was supported by sufficient evidence. A careful review of the findings of fact made by the National Labor Relations Board discloses that there was no such finding of fact.

All of the findings of the National Labor Relations Board with regard to continuity of employment are shown on page 109, and pages 111-112, of the Record. Upon analysis of the findings by the Board on this point it appears that these findings may be fully summarized by the following quotation of the words used by the Board:

> "The respondent asserts that the whole contract between itself and its crews is embodied in the shipping articles under which the crews sail and that the crews are completely discharged and the employer-employee relationship terminated at the end of each particular voyage."

(1) "This assertion is inconsistent with the terms of the respondent's contract with the I. S. U., Article II, Section 1 . . .

(2) "The respondent's assertion is also inconsistent with actual maritime practice as disclosed in the testimony of numerous witnesses . . . that the mere expiration of the shipping articles does not terminate the seamen's employment." (R. 109)."[1]

It is obvious that the only finding of fact included in the foregoing quotation from the Board's decision is the fact, which the Board found, that there is an actual maritime practice or custom by which the employment of seamen is continuous. The other statements made by the Board are purely conclusions of law.

It will be noticed that there is no finding of fact by the Board that there was any separate contract, either oral or written, which provided for any term of employment longer than that provided in the shipping articles. The Board rests its conclusion of law solely upon the general practice or custom which it found to exist, and attempts to lend some added weight to its conclusion by referring to certain provisions of the respondent's contract with the I. S. U. The reference to the provisions of the I. S. U. contract will be hereafter discussed. The most important question to be considered here is whether or not the finding of the Board as to the existence of a general custom or practice can have the effect of leading to the legal conclusion, under the facts of this case (as found by the Board itself), that an employment relationship existed even after the expiration of the term provided in the shipping articles.

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[1] We have inserted the numbers for convenience in reference.

We are convinced that such a custom or practice could not, as a matter of law, vary the terms of the written contract which was entered into between the Waterman Steamship Corporation and the seamen, and we will discuss below the authorities in support of this proposition.

The opinion of the Court in this case, delivered by Mr. Justice Black, makes the following statement in connection with the Board's finding that there was continuity of employment: "That there may be a tenure or term of employment determinable at will is a recognized principle of law. For the purpose of the Act, it is immaterial that employment is at will and terminable at any time by either party." In support of the statement as to employment terminable at will there are cited decisions of Alabama courts. We do not question the correctness of this general proposition, but we do insist that the principle has no application to this case. In order to make clear the point of distinction, we will here quote the pertinent parts from each of the Alabama decisions cited.

> "Undoubtedly a contract of employment which is in a true sense indefinite and without stipulation for an implied minimum period, is at the will of either party."
>
> Alabama Mills v. Smith, 237 Ala. 296, 186 So. 699.

> "The presumption which, as already stated, is entertained by most of the American Courts, that an indefinite hiring is a hiring at will . . .
>
> "Turning to our own cases, the rule is fully recognized that an indefinite employment is terminable at the will of either party. Howard v.

East Tenn., Va. & Ga. R. R. Co., 91 Ala. 268, 8 So. 868."

Peacock v. Virginia-Carolina Chemical Co., 221 Ala. 680, 130 So. 411.

"The contract declared on was for no specific time and was determinable by either party at will, at the end of any week."

Great Atlantic & Pacific Tea Co. v. Summers, 25 Ala. App. 404, 148 So. 332; cert. den. 226 Ala. 635, 148 So. 333.

The above quotations show that the courts in those cases had reference to a hiring which was in a true sense indefinite and made no stipulation for a specific period of time. That situation is entirely different from the situation in this case where there is a written contract of employment providing for a definite and specific term of employment to terminate at the end of the voyage. The term of employment provided for in the shipping articles in question was for one voyage only, as pointed out in our original brief on pages 19 and 25. Furthermore, as pointed out in our original brief, the statute itself required the shipping articles to state "the duration of the intended voyage or engagement." Title 46, United State Code, Sec. 564. We do not believe there can be any doubt that these provisions in the articles have the effect (insofar as the articles themselves are concerned) of definitely fixing the term of employment. While we are unable to find that the Supreme Court of the United States has ever considered the effect of this provision of shipping articles prior to the consideration of the case at bar, we do find that the lower courts have, over a number of years, construed the shipping articles as expressly providing for a very definite term of employment. This construction has been recognized by the United States

Circuit Court of Appeals for the Fourth Circuit, in language as follows:

> "The voyage for which they had shipped was completed when the cargo was discharged at Bangor. U. S. v. Barker, Fed. Cas. No. 14,517(1); The Edwin (D.C.) 23 F. 255, 256; The Larimer (D.C.) 174 F. 429, 430. This being the 'final port of discharge,' they were under no obligation to proceed further with the vessel, **nor was she under obligation to employ them further.**"
>
> The Velma L. Hamlin, (4th C.C.A.-1930) 40 F. (2d) 852.

Although the cited decision of the United States Circuit Court of Appeals for the Fourth Circuit cannot, of course, be binding upon this Court, nevertheless additional weight is given to this decision by the principle of law that judicial construction of a statute in force at the time the contract is entered into becomes a part of the contract. If the judicial construction is changed subsequent to the time that the contract is made, it has been held that this does not have the effect of changing the interpretation of the existing contract. Authorities for these propositions are as follows:

> "The doctrine of this court here to be applied has long been established.
>
> "In Von Hoffman v. Quincy, 4 Wall. 535, 550, 552, 553, 18 L. ed. 403, 408, 409, through Mr. Justice Swayne, we said:
>
> " 'It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle

(1) Note: This apparently should be 14,516.

embraces alike those which affect its validity, construction, discharge, and enforcement'."

Hendrickson v. Apperson, 245 U. S. 105, 62 L. ed. 178, 184.

See, also,

Farmers & M. Bank v. Fed. Res. Bank, 262 U. S. 649, 67 L. ed. 1157.

Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648.

"The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

Douglass v. Pike County, 101 U. S. (11 Otto) 677, 25 L. ed. 968, 971.

See, also,

Anderson v. Santa Anna Twp., 116 U. S. 356, 29 L. ed. 633, 635.

We believe it is absolutely clear from the shipping articles themselves, the relevant statutes, and the foregoing decisions, that the effect of the provision in the shipping articles for one voyage only is to provide, in-

sofar as the shipping articles themselves can provide, for a definite period of employment which will terminate at the end of the voyage, and after which time there is no further obligation on the part of either party. The only question which here arises is whether or not a general custom or practice can have the effect of superseding or adding to the express provisions of this written contract. The Board has not made any finding of fact that there was some other contract existing between the Waterman Steamship Corporation and these crews providing for any different term of employment. Therefore, the only way in which the Board could have arrived at the conclusion that there was a term of employment in addition to that prescribed by the written contract would have been to hold that the general custom or practice had the effect either of adding such provision to the written contract, or of making a contract between the employer and employee where none otherwise existed. It is clear that such a holding would be absolutely erroneous under well established principles of law.

With special regard to the shipping articles it has been held consistently that the terms of these articles cannot be varied by parol evidence. We quote below excerpts from decisions stating this principle.

> "... the shipping articles cannot thus be varied by parol. It is the intention of the statute that the articles shall express the true nature of the voyage, and it is contrary to its policy to permit a variation of the articles by evidence of a verbal agreement made at the time when they were signed. Thompson et al v. The Oakland, Fed. Cas. No. 13,971; The Triton, 1 Blatchf. & H. 282, Fed. Cas. No. 14,181."
>
> Northwestern S. S. Co. v. Turtle (9th C. C. A.-1908), 162 F. 256, 258; aff. 154 F. 146.

". . . . and it is believed that no case can be produced in which a seaman has been permitted to disregard the written contract, unless he has satisfied the court it was executed through fraud or imposition practised upon him."

The Triton (D. C.-N. Y.-1832), Fed. Cas. No. 14,181.

With regard to contracts generally, this rule is also well established. A decision of the Alabama Supreme Court illustrates the point:

"The parties have thus expressed in writing the conditions by which they are to be bound; and it is not in the power of the courts to imply the existence of others. The rule is of very general, if not universal application, that where parties have entered into written engagements, with express stipulations, these cannot be extended by implication. The presumption is, that, having expressed some, they have expressed all the conditions by which they intend to be bound."

Blackman v. Dowling, 63 Ala. 304.

Furthermore, the principle is well established, and has been recognized by this Court many times, that no written contract can be controlled or varied by usage or custom, nor can any usage or custom engraft upon a written contract terms and provisions in addition to, and inconsistent with, those expressed therein. It is, rather, the contract which controls the usage or custom. We have already quoted excerpts from two decisions of this Court clearly establishing this proposition. Orient Mut. Ins. Co. v. Wright, 68 U. S. (1 Wall.) 456, 17 L. ed. 505, 509; First National Bank v. Burkhardt, 100 U. S. (10 Otto) 686, 25 L. ed. 766, cited and quoted supra, pages 8-9.

From the foregoing authorities it is clear that under established and well recognized principles of law the mere existence of a general custom or usage that seamen are generally given the right to sign on again after the termination of a voyage—and this is the only relevant finding of **fact** by the Board (R. 109)—cannot vary the term of employment expressed in the shipping articles, which is the written contract of employment and the only one entered into between the Company and the seamen; nor can such custom have the effect of creating a term of employment which does not otherwise exist.

As previously pointed out hereinabove, the only other basis stated by the Board for its conclusion of law that there is a continuous term of employment existing independently of the shipping articles, and in addition to the term therein prescribed, is the statement that the provisions of the respondent's general contract with the I. S. U. are inconsistent with the idea that the employment terminates at the end of the voyage. This statement by the Board is nothing more nor less than the interpretation of the legal effect of provisions of a written contract. "The construction of all written instruments belongs to the court alone." 13 C. J., Contracts, s. 1031. Since the statement of the Board is a **conclusion of law** rather than a **finding of fact**, it is not conclusive or binding upon the Court, but is subject to review by the Court, and "apparently conflicting provisions must be reconciled if possible by any reasonable interpretation". 13 C. J., Contracts, s. 497.

The provision of the contract referred to by the Board (R. 109) is that provision to the effect that "this section shall not be construed to require the discharge of any employee who may not desire to join the Union." It is certainly reasonable to assume that the purpose of inserting this provision in the union contract was to prevent the shipping companies from being

liable for breach of this contract by retaining any employee during the definite period of employment for which he had signed. There would probably be little reason for such a provision if the only type of employment under shipping articles were employment for one voyage only. But there are many shipping companies which make a practice of signing the seamen on for a definite period of time, such as one year, as allowed by statute (46 U. S. Code, section 572; Respondent's Original Brief, page 19), rather than for only one voyage. This is especially true with companies engaged in coastwise shipping, many of whom were parties to this contract as indicated by the printed contract (especially Article VII, section 2, thereof) which is in evidence as Respondent's Exhibit No. 14, and by testimony which is uncontradicted. (R. 283).

Certainly nothing can be found in this provision, referred to by the Board, to **prohibit** the company and the seamen in connection with any specific voyage from entering into an express written contract making definite provision for the term of employment. There is no finding or contention that there was any discrimination in the making of the contract embraced in the articles.

The provision above discussed is the only provision of the union contract which is referred to in the decision of the Board as being inconsistent with the idea of a limited and definite term of employment (R. 109). However, in the opinion of the Court, delivered by Mr. Justice Black, reference is also made to that part of the I. S. U. contract governing hours of work in home port. As stated in the preceding paragraphs, this contract was drafted to cover many different shipping companies, some of whom made a practice of signing the seamen on articles for a definite period of time rather than for a specific voyage. Of course, in such cases the employment is continuous during the period of time

provided in the shipping articles, and the seamen continue to work in the home port. Furthermore, there is a field of operation for this provision even in those instances in which the seamen have signed for one voyage only. It has never been disputed by the respondent throughout these proceedings that even in cases where the seamen are employed for one voyage only some of the same seamen may sometimes be rehired upon an entirely new contract of employment, for work in the home port.

Moreover, it should be borne in mind that these provisions in question are contained in a contract which is merely one of a general nature between the company and the union. The specific contract of employment **with the employees themselves** is the shipping articles. "If one clause is at variance with another, the one contributing most essentially to the contract will be entitled to more consideration than that which contributes less". 13 C. J., Contracts, s. 497.

We believe it is clear, therefore, that there is nothing in this contract between the respondent and the I. S. U. which is really inconsistent with the fact that in certain specific instances the seamen are signed on shipping articles for one voyage only, and that the term of employment ends upon the termination of the voyage. There is certainly nothing in either of these provisions of the contract with the I. S. U. which, standing alone, is strong enough to be construed as changing the express provisions of the shipping articles limiting the term of employment to one voyage only.

In Mr. Justice Black's opinion he likens the situation here presented to the case of factory workers who are, of course, customarily employed at will, without any obligation of employer or employed to continue the relationship when the day's work is done. There is no similarity in the relationship between factory workers

and their employers and seamen and their employers. As to termination of shipping articles being a termination of the employment, see Report of the then United States Maritime Commissioner, Hon. Joseph P. Kennedy, quoted on page 27 of our original brief. Also, see the testimony of United States Shipping Commissioner, Captain R. G. Dobbin, found on pages 428 and 429 of the Record. For example, a factory worker returns to work on the following day and continues his work in the same manner that he had worked on the preceding day, but in the case of a seaman he is not even permitted to begin work for the steamship company on the following voyage until he has first signed a new written contract in the shape of shipping articles.

We are at a loss to understand how it could be held that where such a situation as above mentioned exists, it can be said that no vacancy has occurred. We can not conceive of a more clear-cut or well defined case of a vacancy than that which exists when a man signs a written contract to do a certain piece of work and finishes that work and is paid off, especially where under the existing laws this man can not even be permitted to do any further work of like kind until he has first entered into a new, formal, written contract with his previous employer for such further work.

Of course, if there is a vacancy at the end of the voyage, as we contend is the case under the facts presented by the Record, then as a matter of law there was no discharge of these crew members, but merely a failure to re-employ them.

In our original brief, and upon oral argument, we strongly urged that there was absolutely no evidence to support the conclusion of the Board that Waterman Steamship Corporation had any animosity toward the C. I. O., and pointed out that the record shows just the

opposite, and discloses that the Waterman Company regularly employed certain classes of its employees who belonged to unions affiliated with the C. I. O. We still feel strongly that our contention in this respect was correct, but inasmuch as the opinion of the Court indicates that this point was considered by the Court, we will not here attempt to re-open this particular phase of the case. We do wish to point out, however, that the opinion of the Court indicates that there was a misconception by the Court of the exact situation which existed with respect to the hiring of seamen for the voyages of the "Bienville" and the "Fairland," respectively, following the lay-ups.

Mr. Justice Black, in his opinion in this case, says:

> "The sole question remaining is whether the evidence supported the findings of the Board that the employment or tenure of the crews and of O'Connor and Pelletier were terminated **because they had joined or engaged in the activities of the C. I. O.**"

The point which we especially wish to stress to the Court is that the Waterman Steamship Corporation did not refuse to give these seamen further employment because of their C. I. O. activities, but simply refused to give them further employment because these seamen did **not** belong to the union whose members were entitled to preference of employment under a solemn and valid contract entered into by the Waterman Steamship Corporation with the American Federation of Labor affiliate known as the I. S. U.

Briefly stated, the position of the Waterman Steamship Corporation is that it could not have re-employed these seamen for a further voyage without violating its preferential employment contract with the A. F. of L. affiliate known as the I.S.U. To illustrate this point

a little further, and to make the position of the Waterman Steamship Corporation a little clearer on the proposition that its failure to re-employ these seamen was in no manner due to these seamen having joined or engaged in the activities of the C.I.O., it will only be necessary for us to call the Court's attention to the fact that exactly the same thing would have happened if not one of these seamen had ever joined the C.I.O., or engaged in any of the activities of the C.I.O. In other words, if each of these seamen had turned in his union book to the I.S.U. and resigned from that union, so that he was no longer a member of that organization, and therefore not entitled to preference of employment, he would not have been re-employed by the Waterman Steamship Corporation even if he had not joined the C.I.O. How then could it be said that the failure of the Waterman Company to re-employ them was due to the fact that they had joined or engaged in the activities of the C.I.O.? In such case none of these seamen would have had any connection with the C.I.O. To state the proposition just a little differently, the activities of these seamen in joining the C.I.O. had absolutely nothing to do with their inability to get employment from the Waterman Steamship Corporation. They could have joined the C.I.O., or any other union except the I.S.U., or they could have refrained from all union affiliation and merely resigned from the I.S.U., and still they could not have been employed by the Waterman Steamship Corporation unless and until they joined the I.S.U. and were eligible for employment under the preferential contract which the Waterman Company had with the I.S.U.

On this petition for a rehearing we are not going to request this Court to reconsider the position which it took, as set out in the opinion of Mr. Justice Black, relative to the weight which the Courts should give to the findings of fact by the National Labor Relations Board,

but we do hope to get this Court to hold with us on the proposition that by upholding the contract which the Waterman Steamship Corporation had with the I.S.U. and which it tried to comply with, and thought it had complied with, this Court will not be disturbing the findings of fact made by the Labor Board, but only deciding a question of law.

It is apparent from the Record that a very grave injustice will be suffered by the Waterman Steamship Corporation, if it is compelled to pay the wages for nearly three years of two full crews for each of the two vessels in question when in truth and in fact only one crew for each ship has rendered it any service. The Labor Board has ordered the Waterman Company to pay its former crews full time on the theory that the Waterman Company had discharged them, rather than the crews being discharged as a matter of law by the operation of the shipping articles. We feel that this Court should grant our petition for a rehearing, because, as a matter of law, the employment of these seamen was terminated when they "signed off" shipping articles and a vacancy existed which had to be filled from the membership of the I.S.U.,—that is, if the Waterman Steamship Corporation was to comply with the terms of a contract which it had entered into in the utmost good faith with a labor union known as the I.S.U.

In our former brief and in our oral argument we laid little stress on the proposition that the "Bienville" was ordered to proceed from Tampa to Pensacola, and then to Mobile, without stopping at Panama City, which is to the East of Mobile, or without going over to Gulfport, which is to the West of Mobile, because the National Labor Relations Board, in its findings of fact, had found that the change of the crew of the S. S. "Bienville" from the I.S.U. to the N.M.U. took place on July 2nd, 1937 (R. 108) whereas the undisputed

evidence showed that the orders relative to the change of schedule were issued on July 1st, 1937, prior to the time that the S. S. "Bienville" had even reached Tampa, Florida. See Respondent's Exhibit No. 25. However, in view of the fact that Mr. Justice Black, in his opinion, seems to lay much stress on the cancelling of the stop at Panama City,—the boat would necessarily first come to Mobile before going on westward to Gulfport,—we wish to call the Court's attention to the fact that there were only 29 tons of cargo scheduled for Panama Ciy and 38 tons for Gulfport, out of a total inward cargo of 2,668 tons. (See Respondent's Exhibit No. 25.) It would be a great deal cheaper for the Waterman Steamship Corporation to bring the "Bienville" into Pensacola or Mobile and re-ship this 29 tons of cargo to Panama City on one of its numerous other vessels touching at these several Gulf ports, rather than to stand the expense of taking a big ocean-going steamer into the harbor of Panama City with the attendant expense incident to the loss of time, pilotage fees, wharfage fees and dockage charges, merely for the purpose of unloading the trifling amount of 29 tons of cargo. So far as the 38 tons of cargo for Gulfport are concerned, that small amount of cargo could also be handled much more economically by a reshipment from Mobile, if the freight was of such character that damage would be done by delaying its delivery until the "Bienville" left Mobile and touched at Gulfport on its next voyage after the making of the necessary repairs. We only refer here briefly to this situation because of the suggestion in Mr. Justice Black's opinion that the stop at Panama City was cancelled for the purpose of speedily discharging the crew. So far as Gulfport is concerned, of course, the "Bienville" would not have gone to Gulfport anyway until after she first came to Mobile, as Gulfport is West of Mobile, while, as above stated, Panama City is East of Mobile. Of course, there was no cancellation of any stops so far as the S. S. "Fairland" was concerned.

The Board found as a fact that the Waterman Steamship Corporation discriminated against the seamen in question, because of a dislike of the Waterman Company for the N. M. U., and the Court, in its decision, concluded that there was sufficient evidence to support this finding by the Board. However, neither the Board, nor the Court in its decision, discussed the situation that the evidence shows without dispute that in arriving at the decision that it could not re-employ the seamen in question without violating the terms of its contract with the I. S. U., the Waterman Steamship Corporation acted upon advice of its General Counsel (R. pp. 312 and 506).

It is generally recognized by the Courts that where a party is confronted with a situation where a decision involving legal questions must be made, and he consults counsel and acts on the advice of counsel in the premises, this establishes good faith. See, as examples, the following cases:

> "These cases, and many others that might be cited, show that if the defendants in such a case as this (malicious prosecution) acted bona fide upon legal advice, their defense is perfect."
>
> Stewart v. Sonneborn, 98 U.S. (8 Otto) 187, 25 L. ed. 116, 120.

> "When the advice is sought and obtained from a person learned in the law, and acted upon under the circumstances stated in the rule, it furnishes a complete defense to the whole action. It constitutes a valid defense to the action for malicious prosecution."
>
> Dent v. De Arman, 100 So. 122, 123, 211 Ala. 189.

Although the reference in the above cited cases is to an action for malicious prosecution, yet the general principle is applicable here, by analogy.

It is our earnest insistence that under the statutes which we quoted in our original brief, and the authorities referred to in this brief, the law is clear that where the shipping articles provide for one voyage only, the employment relationship between the Company and the seamen is at an end upon the termination of the voyage. It is our contention, therefore, that upon the termination of the respective voyages of the "Bienville" and the "Fairland" in this case, and the signing off of the shipping articles, there were created vacancies within the meaning of the contract which the Waterman Steamship Corporation had with the I. S. U., and the Waterman Company, when it was ready to enter into a new contract and have new shipping articles signed, was compelled under the terms of its contract with the I. S. U. to give preference of employment to members of that union.

However, if this Court should finally determine that our contention as to this proposition of law is incorrect, nevertheless the fact remains that the Company in good faith consulted its General Counsel in regard to the proper construction of the shipping articles and the contract in question, and was advised that vacancies within the meaning of the I. S. U. contract had occurred upon the termination of the shipping articles, and that Waterman Steamship Corporation was legally bound to give preference of employment to members of I. S. U. This interpretation given to the Waterman Steamship Corporation by its General Counsel was founded upon the uniform construction which had theretofore been placed upon the form of shipping articles in question by all courts having the matter under consideration. In fact, nowhere in the law books have we been able to find any case, prior to the rendering

of the opinion of Mr. Justice Black in this case, which intimated, hinted, or suggested in the slightest degree that the contract between the steamship company and its seamen was not terminated upon the expiration of the voyage and the signing off of the shipping articles.

WHEREFORE, the Waterman Steamship Corporation respectfully submits to the Court that its petition for a rehearing should be granted; that if consistent with the Rules of this Honorable Court its counsel be permitted to argue the case upon rehearing orally; and that upon such rehearing the judgment of the United States Circuit Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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Of Counsel.

I, Gessner T. McCorvey, do hereby certify that on this the 5th day of March, 1940, I mailed copies of the foregoing petition for a rehearing and brief and argument in support thereof, postage prepaid, to Robert H. Jackson, Esq., former Solicitor General of the United States, Washington, D. C., to Francis Biddle, Esq., Solicitor General of the United States, Washington, D. C.; to Charles Fahy, Esq., General Counsel of the National Labor Relations Board, Washington, D. C.; and to Robert B. Watts, Esq., Associate General Counsel of National Labor Relations Board, Washington, D. C., counsel for petitioner.

Executed this 5th day of March, 1940.

(Gessner T. McCorvey).